

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991))	
)	
Petition for Expedited Declaratory Ruling)	
of the Edison Electric Institute and)	
American Gas Association)	
_____)	

COMMENTS OF EXELON CORPORATION

Exelon Corporation (“Exelon”), by its attorneys, hereby submits its comments in support of the Petition for Expedited Declaratory Ruling (“Petition”) jointly filed by the Edison Electric Institute (“EEI”) and American Gas Association (“AGA”) on February 12, 2015 in the above-captioned proceeding.¹ The Petitioners seek to have the Federal Communications Commission (the “Commission”) adopt a definitive statement confirming that, under the Telephone Consumer Protection Act (“TCPA”),² a customer’s provision of a contact telephone number to an energy utility constitutes “prior express consent” to receive, at that number, non-telemarketing, informational calls in connection with the customer’s utility service, which are placed using an automatic telephone dialing system (“ATDS”) or use an artificial or prerecorded voice.

¹ *Petition for Expedited Declaratory Ruling*, of Edison Electric Institute and American Gas Association, CG Docket No. 02-278 (filed Feb. 12, 2015) (“Petition”). See also *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Edison Electric Institute and American Gas Association*, Public Notice, DA 15-244 (Feb. 24, 2015).

² 47 U.S.C. § 227.

I. INTRODUCTION

Exelon is one of the largest competitive U.S. power generators, with approximately 32,500 megawatts of owned capacity, comprising one of the nation's cleanest and lowest-cost power generation fleets. The company is headquartered in Chicago, and does business in 48 states, the District of Columbia and Canada. Exelon's utilities deliver electricity and natural gas to more than 7.8 million customers in central Maryland (as Baltimore Gas and Electric or "BGE"), northern Illinois (as Commonwealth Edison Company or "ComEd") and southeastern Pennsylvania (as PECO Energy Company or "PECO"). Exelon is a member of EEI.

In 1991, Congress enacted the TCPA, which is, at its core, a privacy statute; a legislative effort to address some telemarketing practices thought to be an intrusion on consumer privacy and a potential risk to public safety.³ The statute was not entirely self-implementing; the Commission was charged with the formulation of rules, and the agency engaged in a rulemaking process and issued its original TCPA rules in 1992.⁴ These TCPA rules, modified over time, still "closely track the TCPA's requirements."⁵ They place conditions on the permissibility of initiating certain voice and text telephone calls⁶ depending on a number of factors. The relevant factors are the nature of the call (whether it is a telemarketing call or a call that delivers an informational message), the technology used (whether the call is initiated using an ATDS or delivered using a prerecorded or artificial voice), and the category of telephone number called

³ See *id.*

⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (1992) ("1992 TCPA Order"); 47 C.F.R. § 64.1200, *et seq.*

⁵ See *In the Matter of Cargo Airline Ass'n Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3432, 3435 (2014) ("CAA Order"); see also *In the Matter of The Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking 7 FCC Rcd 2736, 2737 (1992) ("1992 TCPA NPRM").

⁶ The Commission has concluded that prohibitions on "calls" apply to both voice and text calls. See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830, 1832 (2012) ("2012 TCPA Order").

(whether the number is classified as a residential wireline number or a wireless number).⁷ Those calls considered to be more intrusive, or less expected, were and are subject to the prior express consent of the called party to receive them.

In its most recent TCPA rule amendments in 2012, the Commission focused on, among other things, strengthening the specific called party consent requirements for initiating certain telemarketing calls, specifically revising rules to require prior express written consent for all autodialed or prerecorded or artificial voice telemarketing calls made both to wireless and residential phone numbers. While the Commission considered adopting a prior express written consent for all types of calls to wireless numbers as well,⁸ the Commission ultimately decided to impose this heightened requirement solely to telemarketing calls, leaving intact the previous “prior express consent” requirement for informational calls placed to wireless phone numbers when the calling party uses an autodialer or prerecorded message or artificial voice.⁹

As EEI and AGA correctly assert in their Petition, although the Commission has never defined the term “prior express consent,” it certainly has recognized that the provision of a telephone number constitutes prior express consent to be called at that number.¹⁰ However, the lack of straightforward guidance, when combined with an aggressive plaintiff’s bar fueled by the possibility of high statutory damages,¹¹ has led to a substantial increase in TCPA class action

⁷ This distinction reflects the TCPA’s intent to protect consumers from certain “for which the called party is charged for the call.” See 47 U.S.C. § 227(b)(1)(iii). Cf. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14038 (2003) (*2003 TCPA Order*) (“Allowing wireless subscribers to register on a national do-not-call list furthers the objectives of the TCPA, including protection for wireless subscribers from unwanted telephone solicitations for which they are charged”).

⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, Commission, 25 FCC Rcd 1501, 1510 (2010) (“*TCPA NPRM*”); see Petition at 6.

⁹ See *2012 TCPA Order*, 27 FCC Rcd at 1841; see 47 C.F.R. § 64.1200(a)(1).

¹⁰ See Petition at 8.

¹¹ See 47 U.S.C. §§227(b)(3), (c)(5).

litigation. In response, courts have struggled to interpret aspects of the TCPA and the Commission's rules and orders, including questions of the scope of prior express consent. Perhaps not surprisingly, courts all across the country have reached a range of different results as to the permissibility of certain calls or call programs. Due to the fact-intensive nature of the allegations typically raised in TCPA-related suits, utilities communicating service related information to their customers increasingly have run the risk of finding themselves facing expensive litigation, defending even frivolous claims, at a great cost. Greater certainty from the Commission on important statutory interpretation questions would allow energy utilities to better serve and communicate with their customers without the overarching threat of class action litigation hanging over virtually every informational phone communication made to their customers. For these reasons, and as set forth below, Exelon supports EEI's and AGA's Petition. Exelon urges the Commission to provide energy utilities with much needed certainty by specifically confirming that when a customer provides his or her telephone number to an energy utility, that act constitutes "prior express consent" to receive non-telemarketing, informational calls at that number in connection with the customer's utility service.

II. BOTH LEGAL AND POLICY IMPERATIVES SUPPORT EXPEDITED COMMISSION ACTION

A. Customers Need, Want and Expect Near Real-Time, Non-telemarketing, Informational Communications from their Utility Company.

As the EEI and AGA Petition demonstrates, there is a critical public policy imperative behind the provision of safe, reliable and efficient energy service to millions of utility customers all day, every day.¹² Like other utility companies, Exelon needs to be able to communicate in real time with customers about matters that directly affect their service, such as: planned or unplanned service outages and status of service restoration, and natural disasters. Near real time

¹² See Petition at 1-3.

communication capability is also important to convey information about upcoming meter work, tree-trimming or other field work, or eligibility for certain programs and services (such as those available for people with special medical needs or disabilities), for alerts on billing issues, or cost saving, demand response and energy-efficiency initiatives.¹³ As the Petition explains, State regulatory authorities, recognizing the importance of these communications and the many benefits they offer utility customers, have in some cases mandated and in other cases strongly urged the adoption of these customer communication and outreach programs by utilities.¹⁴

For real time or near real time communications, utilities typically communicate with their customers using the contact phone number that the customer provided when establishing or modifying their service. While this contact number in the past typically was associated with the customer's residence, many utility customers choose to use their wireless phones as their primary — or only phones.¹⁵ Consequently, many customers provide their utility companies with their wireless phone numbers as their preferred or only contact number when establishing or continuing utility service.

As the adoption of personal smartphones has become widespread, customer expectations have evolved, particularly with respect to the ability to receive text message notifications. Customers now want and expect to receive near real-time information about their service, including during outages, and especially during natural disasters.¹⁶ This can be best accomplished through a utility's use of autodialers, prerecorded messages and text-messaging

¹³ See Petition at 3.

¹⁴ See Petition at 4.

¹⁵ See Petition at 5, and see U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July – December 2013* (rel. July 2014), available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>.

¹⁶ See Petition at 4.

technologies which allow companies effectively to reach a large number of affected customers (at their provided contact number) in a relatively short amount of time. Customers who are not interested in reviewing these kinds of informational communications can choose to restrict them or opt-out of them entirely.

B. Under the TCPA, and the Commission's Rules and Orders, a Customer's Provision of His or Her Telephone Number Constitutes Prior Express Consent and No Further Consent is Needed for Informational Utility Calls.

As previously noted, the Commission's TCPA rules "closely track the TCPA's requirements,"¹⁷ and impose different restrictions or conditions on the permissibility of certain voice and text calls depending on factors such as the nature of the call, the technology used, and the phone number called.¹⁸ Under the TCPA and the Commission's implementing regulations, calls cannot be placed to certain numbers including emergency lines, health care facilities or similar establishments, and to phone numbers assigned to wireless phones, nor may a caller use an ATDS to place a call or deliver a call using a prerecorded or artificial voice message, unless the call is made with the prior express consent of the called party or for emergency purposes.¹⁹ As EEI and AGA observe in their Petition, this is due, at least in part, to the fact that traditionally incoming calls to residential lines imposed no additional cost on the called party, while wireless service plans charged both incoming and outgoing calls to the called party at a per minute rate against a bucket of minutes.²⁰ The 1991 statute reflects an understandable Congressional intent

¹⁷ See *CAA Order*, 29 FCC Rcd at 3435; see also *1992 TCPA NPRM*, 7 FCC Rcd at 2737.

¹⁸ See, generally 47 C.F.R. § 64.1200.

¹⁹ See 47 C.F.R. § 64.1200(a)(1); *2012 TCPA Order*, 27 FCC Rcd at 1841.

²⁰ See Petition at 6. Of course, the pervasive availability of "all you can eat" wireless service plans means that many wireless customers will not be separately charged for any individual call or text message.

to shield consumers from unwelcome calls “for which the called party is charged.”²¹ While the Commission in its 2010 rulemaking proceeding asked for comment about adopting a new requirement for “prior express written consent” for all calls to wireless numbers,²² it ultimately determined that this heightened consent requirement was appropriate only for telemarketing calls, leaving the already-existing “prior express consent” requirement for non-telemarketing, informational calls intact.²³

In contrast to the now quite specific rule-based requirements for what constitutes “prior express *written* consent,”²⁴ the Commission did not further define what it would deem to be “prior express consent.” However, as the Petition explains very well, the Commission has “held that provision of a telephone number within the context of a transaction serves to provide ‘prior express consent’ to receive calls related to that transaction,”²⁵ and also has clarified this finding in subsequent orders, concluding that “the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”²⁶ More recently, in the *GroupMe Declaratory Ruling*, the Commission referred to the *ACA Order* holding, stating that that order

²¹ See 47 U.S.C. § 227(b)(1)(iii). *Cf.* 2003 *TCPA Order*, 18 FCC Rcd at 14038 (“Allowing wireless subscribers to register on a national do-not-call list furthers the objectives of the TCPA, including protection for wireless subscribers from unwanted telephone solicitations for which they are charged”).

²² See *TCPA NPRM*, 25 FCC Rcd at 1510. See also Petition at 6.

²³ 2012 *TCPA Order*, 27 FCC Rcd at 1841.

²⁴ See, *e.g.*, 47 C.F.R. § 64.1200(f)(8) (emphasis added).

²⁵ See Petition at 7-8, citing 1992 *TCPA Order*, 7 FCC Rcd at 8769.

²⁶ See Petition at 8, citing *Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, Order, 23 FCC Rcd 559 (2008) (“*ACA Order*”).

makes plain that “consent to be called at a number in conjunction with a transaction extends to a wide range of calls ‘regarding’ that transaction.”²⁷

In light of these Commission statements, the policy goals of the TCPA remain the centerpiece of the Commission’s rules and policies. As the Commission itself has put it, the agency’s goal is to “help consumers avoid unwanted communications that can represent annoying intrusions into daily life and, in some cases, can cost them financially” without “inhibit[ing] communications consumers may want and that do not implicate the harms TCPA was designed to prevent.”²⁸ The fact that a customer provides a telephone number to an energy utility constitutes “prior express consent” to receive non-telemarketing, informational calls at that phone number in connection with that customer’s utility service should already be crystal clear.

Notwithstanding these facts, utility companies who engage in real time or near real time communication with their customers about power outages or restoration, or alert customers to spikes in their personal energy consumption and opportunities for conservation, face a tremendous risk of class action litigation that have little if any upside to utility customers or to the public at large. Instead, these lawsuits or threatened lawsuits freeze useful and expected communications. As EEI and AGA observe in their Petition, recent TCPA lawsuits have “create[d] an environment in which TCPA defendants who have consent, or make calls that are otherwise exempted, still must go through expensive discovery in order to defeat frivolous claims.”²⁹ This is a disconcerting reality for utility companies and their customers who would

²⁷ See Petition at 8, citing *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd 3442, 3446 (2014) (“*GroupMe Declaratory Ruling*”).

²⁸ See *GroupMe Declaratory Ruling*, 29 FCC Rcd at 3442.

²⁹ See Petition at 11.

otherwise have the benefit of timely, actionable information. The specter of class action lawsuits discourages the dissemination of useful information. These suits can drain company resources, even if the suits are ultimately dismissed and the reality of statutory damages never comes into play. Given the fact-intensive nature of the claims that may be presented, the utility has to defend against TCPA lawsuits, whether they have any merit or not. This has led to understandable caution in the continuation or roll out of customer communication programs that have obvious public and private benefits. Exelon can attest that the lack of direct statements from the Commission on the scope of acceptable consent for informational communications to utility customers has led to the Exelon companies restricting, eliminating or even suspending the very kinds of important non-telemarketing, informational communications that customers expect and increasingly demand.³⁰

An expedited ruling confirming that providing a telephone number to an energy utility in the course of establishing or modifying energy service constitutes “prior express consent” to receive informational calls about that service would provide much needed regulatory certainty. A Commission statement as to utility service communications would be consistent with the goals of the TCPA and would provide much needed guidance and assurance to energy utilities, and allow customers to receive the kinds of informational communications they have come to expect from their utility companies.

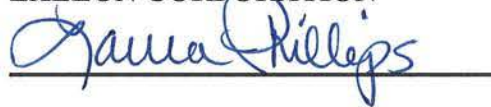
³⁰ See Petition at 4.

III. CONCLUSION

For all these reasons, Exelon supports the Petition and urges the Commission to confirm expeditiously that providing a telephone number to an energy utility as a contact number constitutes "prior express consent" to receive ATDS, or prerecorded voice non-telemarketing, informational calls at that phone number. Customers will still be able to tailor the alerts they receive, or even opt out entirely, but it is critical that the Commission provide clarification on this point so as to remove any doubt that these calls are permissible under the Commission's rules.

Respectfully submitted,

EXELON CORPORATION



Laura H. Phillips
Camillie Landrón
DRINKER BIDDLE & REATH LLP
1500 K Street NW, Suite 1100
Washington, D.C. 20005
(202) 842-8891
Laura.Phillips@dbr.com

Its Attorneys

March 26, 2015